State of Michigan
Court of Appeals
Lansing Office

May 4, 2010

Representative Mark S. Meadows
Chair of the House Judiciary Committee
1088 House Office Building
Lansing, MI 48909

Re: House Bill 5800

Dear Chairman Meadows:

We are writing on behalf of the Court of Appeals to express very strong concerns with House Bill 5800 regarding Headlee actions in the courts. Given the number and nature of the concerns detailed in this letter, among others that may be raised on further review, we urge that a vote on HB 5800 be delayed until representatives of the Court of Appeals and perhaps representatives of the Supreme Court can meet with you or your aides to discuss this proposed legislation.

First, despite the direct impact of this legislation on the Court of Appeals, the Court was not invited to collaborate on drafting the legislation nor was the Court asked for its comments on the bill in advance of the May 5 hearing. And yet HB 5800 impacts the Court of Appeals in ways that are overbroad, burdensome, or unnecessary.

Second, the proposed amendment of **Section 308a** directs commencement of these actions only in the Court of Appeals, and that limitation sets up an anomaly to the extent that fact finding is required in a given case. The Court of Appeals is a reviewing court and is not structured to engage in fact finding to dispose of cases pending before it. Trial courts are structured for that purpose. Admittedly, despite that variance in structure, a fair number of Headlee cases have been initiated in the Court of Appeals but that is reportedly in part because some filers believe that a prevailing taxpayer may recover costs from the applicable unit of government only in cases filed in this Court. See Const 1963, Art 9, Sec 32. In fact, however, MCL 600.308a(6) authorizes a prevailing plaintiff to recover "costs incurred by the plaintiff in maintaining the action." Thus, the ability to recover fees should not be a controlling concern in deciding where a Headlee action is commenced.

Logically, a taxpayer who has a Headlee action that needs factual development should file in the circuit court, and those with only legal issues should file in the Court of Appeals. But HB 5800 will render such a filing structure impossible because it removes the circuit court's concurrent jurisdiction. Rather than impose on the Court of Appeals a class of cases that it is ill-equipped to resolve because fact

finding is required, it might be wiser to create an expedited fact-finding track in the circuit court for Headlee actions followed by "priority" appeals to this Court.

Third, the proposed amendment of **Section 308b** directs that the Court of Appeals shall not require the taxpayer "to state allegations in the complaint with any greater specificity or particularity than is required of a plaintiff generally in a civil action or to attach to the complaint any document or thing what would not be required generally to be attached to a complaint in a civil action." This provision is a direct attack on the specific pleading requirement for Headlee cases filed in the Court of Appeals that is stated in current Michigan Court Rule 7.206(D)(1)(a) and (D)(2)(a). Our specific pleading requirement was specially designed to speed this Court's deliberation of each Headlee case by providing the three-judge panels with as much detail about each case as possible in the initial pleadings. Allowing the parties to delay specific pleading until later in the proceedings encourages delay and runs directly counter to the proposed requirement in **Section 308f** that the Court of Appeals should conclude its review within 6 months, including any time allocated to a special master to make findings of fact and conclusion of law. Legitimate Headlee complaints should be capable of being stated with specificity in the first filing, especially given that time is always of the essence in such matters. If proponents of the legislation insist on less specific pleading requirements, they should accede to the provision of more than six months in which such cases must be initially disposed.

Fourth, with regard to **Section 308d**, the Court of Appeals has used an internally developed special master procedure since at least 2006 to secure findings of fact in the more complicated Headlee original actions filed in the Court. This process has worked well and need not be disbanded in favor of a permanent special master appointed by the Supreme Court to work in the Court of Appeals as is contemplated in Section 308d. However, if such a position is retained in the legislation, the Court of Appeals should be authorized to make the appointment, and funding for that position should be provided by the Legislature because it will result in higher costs for the Court at a time when it is struggling to cover its existing personnel and operational expenses.

Fifth, Section **308e** requires the Court of Appeals to give Headlee actions priority over all other nonemergency matters pending before the Court. Although only a small number of Headlee matters may be pending before this Court at any given time, mandating higher priority to Headlee matters than to such other existing priorities as appeals involving child custody, or orders terminating parental rights, is problematic. Further, if this legislation results in an increase of Headlee filings in this Court, is it a true reflection of societal values that such cases should actually be disposed in advance of previously filed cases involving child custody or termination of parental rights?

Sixth, as noted above, **Section 308f** essentially imposes a 6-month deadline on this Court's review and disposition of Headlee cases, after which the mandate that is at issue will be stayed under Section 9(b)(ii) of HB5802. This section of HB 5800 appears to be a solution in search of a problem in terms of how Headlee actions have proceeded in the Court of Appeals for at least the past 14 years.

- Twenty-one Headlee original actions have been filed with the Court of Appeals since 1996.
- Nine of the cases were filed and initially disposed by Court of Appeals *order* within a *maximum* of 9 months.

- Eleven of the cases were filed and initially disposed by Court of Appeals *opinion* within a *maximum* of 1.57 years.[1]

Thus, none of the Headlee original actions filed in this Court in the past 14 years remained pending in the Court of Appeals for more than 1.57 years before the first disposition by order or opinion. To the extent that some of these cases were subsequently appealed by the parties to the Supreme Court, and a small number may have undergone multiple rounds of appeals and remands, we invite your recognition that appeals and remands between these courts are a natural element of the judicial process that results in tested and trusted dispositions. Such procedures are driven in part by the parties and, in any event, do not reflect a lack of will to decide pending Headlee matters with due speed as well as due deliberation. Some of the more highly visible Headlee cases are, by their very nature, among the most complicated litigation to be reviewed by the courts. Speed for the sake of speed in resolving such cases will not benefit the public interest if the decisions are ill-advised as a result. The consumption of barely 18 months to reach an initial disposition in a complicated case is not indicative of delay. Further, to the extent that time to final disposition is a true concern, the pending legislation does not address the overall time that might be spent on multiple appeals and remands between the courts.

In conclusion, on the basis of the concerns enumerated here, we urge that a vote on HB 5800 be delayed until representatives of the Court of Appeals and perhaps representatives of the Supreme Court can meet with you or your aides to discuss this proposed legislation.

Very truly yours,

William B. Murphy
Chief Judge

Sandra Schultz Mengel
Chief Clerk

cc: Chief Justice Marilyn Kelly, Michigan Supreme Court
Representative Andrew J. Dillon, Speaker, House of Representatives
Representative Vicki Barnett, House of Representatives
Representative Deb Kennedy, House of Representatives
Representative Gary McDowell, House of Representatives
Representative Jeff Mayes, House of Representatives
Michael F. Gadola, Michigan Supreme Court Counsel

[1] The final case is pending before the Court of Appeals in abeyance status awaiting disposition of another matter that is under review by the Supreme Court.